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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ANNAMARIE REYNAUD,

Plaintiff and Respondent,

v.

ALBERT ROLLINS,

Defendant and Appellant.

B176959

(Los Angeles County Super. Ct.  
No. SC069744)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Craig D. Karlan. Reversed.

Law Office of Brad Dale Tubin, Bradley Dale Tubin; Law Office of Steven Karlton  
Kop and Steven Karlton Kop for Defendant and Appellant.

Paul M. Hittelman for Plaintiff and Respondent.

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Defendant and appellant Albert Rollins appeals from a judgment following a court trial in favor of plaintiff and respondent Annamarie Reynaud in this action for declaratory relief concerning a real property purchase agreement. Rollins contends the trial court's declaration finding Reynaud was entitled to purchase the property is not supported by substantial evidence. We conclude that Reynaud failed to make payments as required by the purchase agreement, her breach of the agreement was not excused, and she was not entitled to declaratory relief allowing her to purchase the property. We therefore reverse the judgment.

## **FACTS AND PROCEDURAL BACKGROUND**

### **The Parties' Agreement**

In November 1999, Reynaud began negotiations with Rollins to purchase three parcels of property in Topanga totaling approximately 20 acres. On September 19, 2000, Reynaud sent a letter to Rollins stating that she would purchase the parcels for a total purchase price of \$750,000 through a "land subordination agreement."<sup>1</sup> She proposed to pay Rollins interest equal to ten percent of the unpaid balance once the agreement commenced. Reynaud intended to develop and pre-sell individual parcels.

After additional negotiations, in November 2000, the parties entered into a "purchase agreement." The agreement included the following terms: "The purchase price for the property is \$800,000.00. Interest only, at the rate of 10 percent per annum shall be paid on \$750,000.00 of the purchase price monthly until the sale is completed. Upon opening of escrow, [Reynaud] shall deposit a payment equal to interest only for the period between August 1, 2000, and October 10, 2000, of \$14,375.00. Subsequent interest only payments of \$6,250.00 shall be paid into escrow on the 10th of the month, commencing with the 10th of

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<sup>1</sup> Although both parties make reference to the "land subordination agreement," the meaning of the phrase in the context of this case is never explained in the record or the briefs.

November, 2000, until the sale is completed. The sale of the property shall be completed upon [Reynaud's] deposit of the total purchase price of \$800,000.00 into escrow and [Rollins's] instructions to escrow to release the purchase price to him or as designated by him."

The agreement also provided: "The parties anticipate closing of escrow with the payment of the final \$800,000 within a period of 18 months, notwithstanding, provided that the monthly payments are timely received, [Rollins] will grant [Reynaud] reasonable extensions of time to make the final payment. Until such time as escrow closes, the sale will not be complete and upon default by [Reynaud], [Rollins] shall retain all moneys paid."

The agreement also stated that Rollins "shall retain an exclusive easement over the property, to be located as required for his purposes." The easement and rights to the easement were to be set forth in an attached drawing. The agreement explicitly stated, however, that it was binding and exhibits referred to in the agreement could be attached at a later time. In addition, "[t]he parties anticipate a double escrow which shall allow [Reynaud] to obtain the purchase money required of her." The parties noted that they anticipated the escrow instructions would clarify details of the purchase, but that they entered into the agreement intending to be bound by it.

### **Performance and Default**

Reynaud made the initial interest payment of \$14,375 pursuant to the agreement. Rollins requested that Reynaud defer the first two monthly interest payments until the end of the transaction, because the tax consequences were more advantageous for him. In December 2000, Reynaud sent a letter to Rollins confirming that she would defer the payments for November and December 2000. Reynaud began making monthly interest payments in 2001.

Reynaud did not make the monthly interest payments for July and August on time. Rollins gave Reynaud property tax bills for the properties and requested that Reynaud borrow additional funds to pay off a lien of \$125,000 that was due on one of the parcels. He told her that she needed to agree to pay the lien before he would agree to "subordinate" to her

construction loan. On August 9, 2001, Reynaud responded in a letter to Rollins that the purchase agreement did not require her to make a payment of \$125,000. She complained that the amount of the encumbrances on one parcel, namely, \$125,000 for the lien and \$250,000 to Rollins, endangered her ability to obtain a construction loan. She stated that she needed clear title to the parcel with the lien in order to demonstrate to the lender that she had sufficient equity in the whole project. She wrote: “At this time, I am not willing to make any further interest payments to you until such time that you and I can meet with my attorneys to review our transaction. [¶] To date, I have paid \$58,750 to you and have no assurances that the deal will not quit changing.” Reynaud returned the tax bills to Rollins and stated that they were not yet her bills to pay.

Reynaud subsequently made the July payment on August 18, 2001, and made the August payment on September 24, 2001. Reynaud and Rollins had a meeting to discuss their issues. On September 30, 2001, Reynaud wrote a letter to Rollins stating that they were at an impasse because he needed her to borrow money to pay his lien, whereas she could only borrow the funds she had committed to borrow for the project. She stated, “While I am clear that I will not re-commence the interest payments to you until this breach of your agreement with me that you would subordinate the title to each parcel to a construction loan, I am willing to see how we can help each other. [¶] . . . [¶] I hope you will give my various proposals some sincere thought and contact me at your earliest convenience. [¶] . . . [¶] For the current moment, I am again declaring you in breach of your contract with me for this land and will not be forwarding any further interest until matters are resolved.” On October 8, 2001, Reynaud wrote another letter to Rollins stating that their agreement required him to subordinate to construction loans and his insistence that she pay off the \$125,000 encumbrance prevented her from proceeding. Again, Reynaud refused to resume making monthly interest payments.

On October 9, 2001, Rollins sent a letter to Reynaud stating that she was in default for failing to make three payments, including the payments for November and December 2000, and her right to purchase the property terminated. However, Rollins offered that if Reynaud

paid \$25,000 into escrow, her default would be cured and her interest payments would be current to November 10, 2001. Reynaud made no further payments.

### **The Instant Action**

On December 14, 2001, Reynaud filed a complaint for declaratory relief requesting a declaration of her rights in the property and preventing the sale of the property to any other person. Rollins filed an answer and a cross-complaint for declaratory relief, breach of contract, and intentional infliction of emotional distress on February 27, 2003. A trial was held on February 17 and March 4, 2004.

On May 11, 2004, the trial court issued a tentative ruling declaring the rights of the parties. The trial court found the parties had agreed that Reynaud would purchase the property for \$800,000 within 18 months, with additional time if necessary. The agreement did not provide for the purchase of individual parcels, require title to be placed in Reynaud's name, or provide for subordination. The trial court acknowledged that there was an understanding between the parties that title would somehow be vested in Reynaud's name and Rollins would work with Reynaud prior to the purchase to put title in her name to facilitate her ability to obtain a construction loan to develop the property. In addition, Rollins agreed to "subordinate," but the parties never worked out any terms and no subordination provision was ever put into the agreement.

The trial court found that Reynaud did not make the two initial interest payments in 2000 at Rollins's request. The trial court noted that when Rollins requested that Reynaud borrow additional funds to pay off the \$125,000 lien, Reynaud could have declined and continued to make the regular interest payments under the agreement. Since there was no requirement under the agreement that Rollins subordinate any loan, his statement that he would refuse to subordinate was an empty threat. The trial court found that Reynaud "failed to include this land subordination agreement or clause in the contract. She had ample time to do so. Double escrow was put in instead which envisions a different form of financing. [¶] She

failed to memorialize how the terms for putting this parcel in her name would take place. And she stopped paying the interest. [¶] A more prudent course of action would have been to keep paying the interest and file a declaratory relief motion at that point.”

The trial court also concluded the agreement was a purchase agreement, rather than an option to purchase, based on the form of the agreement, as well as Rollins’s actions in giving Reynaud the property tax bills to pay and his statements in the October 9, 2001 letter offering that she could “cure” her default.

Based on the evidence of Rollins’s desire to sell and Reynaud’s desire to buy the property, the trial court made the following declaration as part of the tentative ruling: “The Court declares that [Reynaud] shall have the right to purchase the property from [Rollins] under the following terms and conditions: [¶] [Reynaud] shall purchase the property at the price of \$800,000.00 in addition to \$206,250.00 in interest. Furthermore, [Reynaud] is to make 3 payments, each in the amount of \$6,250.00, one on May 26, 2004, one on June 10, 2004 and one on July 10, 2004. [Rollins] is to pick up the checks on the dates indicated above at or after 4:00 p.m. from [Reynaud’s attorney’s] office. [¶] The Court retains jurisdiction over the sale of the property.” The trial court also ordered judgment on the cross-complaint in favor of Reynaud. The trial court stated that the tentative ruling would become the statement of decision unless within ten days a party specified controverted issues not covered in the tentative.

### **Subsequent Proceedings and Entry of Judgment**

On June 3, 2004, the trial court granted a temporary restraining order against Reynaud that required her to stay a minimum of 100 yards from the property and ordered the parties to open an escrow account. On June 15, 2004, the trial court specifically ordered the parties to open escrow by June 16, 2004. The trial court also instructed Reynaud to call the court by 2:00 p.m. that afternoon to set a date for the lender and appraisal company to view the property, advise the court by 3:00 p.m. on June 21, 2004, of her decision to buy the property at

issue, and release the money deposited in her attorney's trust account to Rollins by June 22, 2004. On June 22, 2004, the trial court denied a request by Reynaud to extend the escrow closing date of July 14, 2004, but extended the time for release of the funds deposited in her attorney's trust account and ordered that she could enter the property at a specific date and time. The trial court indicated that it might reconsider its tentative ruling of May 11, 2004.

At a hearing on July 8, 2004, the trial court vacated the restraining order, finding that it had been issued on an incorrect basis. Based on the form of Reynaud's complaint as a declaratory relief action, the trial court also concluded that judgment needed to be entered and the court could not retain jurisdiction or otherwise assist the parties in concluding the purchase.

At a hearing on July 12, 2004, the trial court noted that the parties did not argue at trial that the agreement was vague or the easement was a material term, nor did the parties request a declaration as to the easement and neither party accepted the trial court's offer to take evidence and determine the terms of the escrow or the location of the easement. However, the trial court noted that the parties were required to act in good faith in resolving any disagreements.

That day, the trial court entered judgment in favor of Reynaud declaring she had the right to purchase the three parcels for a purchase price of \$800,000. In addition, Reynaud must pay \$231,250 in interest for 37 months, through August 2004. Reynaud must make four interest payments of \$6,250 each to Rollins on May 26, June 10, July 10, and July 23, 2004. The remaining \$206,250 of the interest payment was payable at the close of escrow on August 5, 2004. Additional terms provided in the November 2000 written agreement that did not contradict the trial court's declaration were to be included as terms of the sale. The parties were to act in good faith to resolve the terms of escrow and the location of all easements. Rollins filed a timely notice of appeal.

On July 27, 2004, a new attorney substituted in for Reynaud and requested ex parte that the trial court retain jurisdiction and fashion a decree to implement the parties' rights. The trial court again stated that it had no jurisdiction to act beyond a declaration of the parties' rights under the purchase agreement as presented to the court at trial. The trial court stated: "[I]n essence, what I would be doing is converting this from a declaratory relief cause of action to a

specific performance without the benefit that the defense would get if you filed it. . . . In essence, what you want me to do is keep jurisdiction and make sure the deal goes through which really is a specific performance remedy.” The trial court noted that it had not made any factual determinations since the conclusion of the case in May and had not evaluated any information to determine whether a party had breached the declaration. The trial court denied the application for ex parte relief.

## DISCUSSION

### **Standard of Review**

“It is well established that a true action for declaratory relief is equitable: ‘An action for declaratory relief is an equitable proceeding and the powers of a court are as broad and extensive as those exercised by such court in any ordinary proceeding in equity [citation]. It is elementary that questions relating to the formation of a contract, its validity, its construction and effect, excuses for nonperformance, and termination are proper subjects for declaratory relief [citation].’ [Citation.] Declaratory relief is ‘classified as equitable by reason of the type of relief offered.’ (5 Witkin, Cal. Procedure (4th ed. 1996) Pleading, § 806, p. 262.)” (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 24.) The trial court’s decision in a declaratory relief action will not be disturbed on appeal absent a clear abuse of discretion. (*California Ins. Guarantee Assn. v. Liemsakul* (1987) 193 Cal.App.3d 433, 438.)

The interpretation of a writing is a question of law, even if extrinsic evidence has been introduced, as long as the extrinsic evidence is not conflicting. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) However, “[w]hen the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court’s resolution of the factual issue is supported by substantial evidence, it must be affirmed.” (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)



## **Breach of the Agreement**

Rollins contends that Reynaud breached the parties' agreement by failing to make monthly interest payments beginning in September 2001, and therefore, her right to purchase the property was terminated. Reynaud contends she was excused from making monthly interest payments by Rollins's conduct. Based on the trial court's findings, we conclude that Reynaud was not relieved of the requirement to make monthly interest payments. Her failure to make monthly payments was a material breach of the parties' agreement and she is no longer entitled to purchase the property.

A plaintiff who seeks to enforce a contract must show that he or she complied with the conditions of the contract that he or she was required to perform. (*Pry Corp. of America v. Leach* (1960) 177 Cal.App.2d 632, 639.) "The plaintiff must be free from substantial default in order to avail himself or herself of the remedies for the defendant's breach. Hence, the plaintiff must plead and prove performance or tender on his or her part or an excuse for performance." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 848, p. 935; see *Pry Corp. of America v. Leach, supra*, 177 Cal.App.2d at p. 639.) If a party to an agreement materially fails to perform and the failure to perform is not justified by the conduct of the other party, then the other party's duty to give the agreed exchange is discharged. (*Pry Corp. of America v. Leach, supra*, 177 Cal.App.2d at p. 639.) Moreover, a partial breach of contract by the promisor, "which means of course that the time for a portion of the performance was due," followed by the promisor's repudiation of the contract may be considered a total breach of the contract. (*Gold Min. & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29.)

In this case, Reynaud failed to make the interest payment due in September 2001. She subsequently wrote two letters to Rollins refusing to resume paying the monthly interest required under the purchase agreement, and she in fact made no further interest payments. Reynaud's actions breached the parties' agreement.

Reynaud contends the trial court found that her failure to make monthly payments under the contract was excused or justified by Rollins's conduct. In essence, she argues that Rollins

anticipatorily breached the contract by failing to cooperate in July 2001 and attempting to negotiate new terms, or by sending the October 9, 2001 letter stating that her right to purchase the property had terminated. Contrary to Reynaud's contention, Rollins's conduct did not rise to the level of an anticipatory breach.

“While an actual breach of contract cannot occur until the time for performance has arrived, an anticipatory repudiation of the contract, or anticipatory breach, occurs before performance is due under the contract and results in a total breach. [Citation.] A party anticipatorily breaches a contract expressly by unequivocally refusing to perform, or impliedly by conduct ‘where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible.’ [Citation.] A promisor’s anticipatory repudiation permits the promisee to recover damages immediately for a total breach of contract without performing or offering to perform any conditions precedent under the contract. [Citations.]” (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1275-1276; see *Howard S. Wright Construction Co. v. BBIC Investors, LLC* (2006) 136 Cal.App.4th 228, 243 [“Anticipatory breach arises where a party repudiates performance of its obligations before they come due; if sufficiently significant, the anticipatory breach discharges the other party’s obligations and creates in the other party the right to pursue remedies for breach immediately.”].)

The refusal to perform must be unequivocal and absolute. (*Salot v. Wershow* (1958) 157 Cal.App.2d 352, 357.) “Generally a mere threat not to perform will not constitute a repudiation.” (*Thornton v. Victor Meat Co.* (1968) 260 Cal.App.2d 452, 476.) “ ‘A mere declaration . . . of a party of an intention not to be bound will not of itself amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot by any act or declaration destroy the binding force and efficacy of the contract. To justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract . . . and must be distinct, unequivocal and absolute.’ ” (*Salot v. Wershow, supra*, 157 Cal.App.2d at p. 357.)

Reynaud relies on Rollins's actions in July 2001 requesting that she borrow funds to pay off his loan obligation, refusing to cooperate with a vague promise to "subordinate," and refusing to put title to the property in Reynaud's name. However, Rollins's actions did not constitute a breach of the agreement and did not excuse Reynaud from continuing to make the interest payments required under the agreement. As the trial court noted, Rollins's request that she borrow additional funds was simply an attempt to negotiate additional terms and had no effect on their agreement. Therefore, she could have simply declined his request. The trial court also found that the parties' agreement did not require Rollins to cooperate in the subordination of a third party loan, take back and subordinate a promissory note on the property, or transfer title to Reynaud. Therefore, Rollins's threat not to perform these acts unless Reynaud paid off his loan obligation also had no effect on the contract and were consistent with an attempt to negotiate additional terms. Nor did Rollins's letter on October 9, 2001, constitute an anticipatory breach of the agreement. Reynaud had breached the contract by failing to make the September 2001 payment and sent two letters refusing to make any further monthly payments prior to Rollins's communication to her on October 9, 2001, noting that she had breached the contract and her right to purchase the property terminated.

As a result of Reynaud's breach of the parties' agreement, she was not entitled to a declaration stating that she had a right to purchase the property. The judgment in her favor must be reversed. Under the parties' agreement, Rollins was entitled to retain any interest payments that Reynaud made up until the time of her breach in September 2001. However, Reynaud is entitled to recover from Rollins any interest that she paid to Rollins pursuant to the July 12, 2004 judgment.

### **Characterization as a Purchase Agreement**

Rollins also contends the trial court erred in finding that there was an agreement to sell the property. In Rollins's view, Reynaud merely held an option to purchase the property, and her failure to exercise that option terminated her right to purchase. In light of our holding that

the declaratory judgment cannot stand, we need not decide whether the agreement was an option.

### **DISPOSITION**

The judgment is reversed. The trial court is directed to enter a new and different judgment in favor of Albert Rollins and against Annamarie Reynaud. Rollins is awarded his costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.